

ERIC G. FERNANDEZ (No.269864)
LAURIE HOWELL(No.098785)
TFLG, A Law Corporation
2121 2ND STREET, SUITE C105
DAVIS, CA 95618
TELEPHONE: (530) 750-3700
FACSIMILE: (530) 750-3344
eric.fernandez@dre-apc.com

Attorneys for Defendant/Movant
U.S. BANK NATIONAL ASSOCIATION,
as Trustee

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION - LOS ANGELES

ANDREW CAMERON BAILEY and	)	Case No. 2:11-cv-3227 GW(CWX)
CONSTANCE BAXTER MARLOW,)	
	)	MEMORANDUM OF POINTS AND
Plaintiffs,	)	AUTHORITIES IN SUPPORT OF
	)	MOTION TO REMAND CASE TO STATE
v.	)	COURT
	)	Date: 6/2/11
U.S. BANK NA, as Trustee,	)	Time: 8:30 am
et al.,	)	Ctrm: 10
	)	Judge: Hon. George H. Wu
Defendants.)	
	)	ORAL ARGUMENT NOT REQUESTED

U.S. BANK NATIONAL ASSOCIATION, as Trustee, designated as a
"Defendant" in this action (hereinafter "U.S. BANK"), submits the
following in support of its motion to remand to the Superior Court.

INTRODUCTION

U.S. BANK is the Plaintiff in a state court unlawful detainer
action filed against ANDREW CAMERON BAILEY and CONSTANCE BAXTER
MARLOW (hereinafter "Plaintiffs") to recover possession of real
property located at 153 Western Avenue, Glendale, California (the
"Property") after a non-judicial foreclosure sale conducted in
August of 2010.

MEMORANDUM OF POINTS AND AUTHORITIES

1 As set forth in the documents filed herein, U.S. BANK filed the
 2 unlawful detainer complaint on March 9, 2011 (Exhibit A to the
 3 Notice of Removal). On March 18, 2011, Plaintiffs filed an answer
 4 to the complaint (Exhibit C to the Notice of Removal). On October
 5 20, 2010, Defendant filed their Notice of Removal of the unlawful
 6 detainer, essentially in order to "consolidate" it with the separate
 7 action filed by Plaintiffs in this court, and thereby allowing
 8 Plaintiffs to obtain a free stay the trial of the unlawful detainer
 9 inasmuch as the Superior Court automatically acted on the removal
 10 and will not proceed without an order of remand from this Court.

11 **PLAINTIFFS HAVE FAILED TO ESTABLISH ANY FEDERAL QUESTION**

12 28 USC §1446 requires the party removing an action to federal
 13 court to demonstrate in the removal notice the basis for the
 14 removal. The removing party bears the burden of establishing that
 15 federal subject matter jurisdiction exists. Emrich v. Touche Ross
 16 & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). There is a strong
 17 presumption against removal jurisdiction. Gaus v. Miles, Inc., 980
 18 F.2d 564, 566 (9th Cir. 1992); therefore, doubts about the
 19 removeability of a case must be resolved in favor of remanding it
 20 to state court. *Id.* In this case, Plaintiffs contend that removal
 21 is authorized on the ground that the separate action they filed
 22 alleges claims under various federal statutes, including the Real
 23 Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act
 24 "TILA") and the Fair Debt Collection Practices Act ("FDCPA").¹ A
 25 reading of U.S. BANK's removed state court complaint, however, shows
 26 that it is solely an unlawful detainer action based on the statutory
 27 procedures for obtaining possession after a foreclosure sale. None
 28

¹The Complaint is actually titled "Verified Complaint to Quiet Title to Real Property."

1 of the federal statutes alleged by Plaintiffs are anywhere
2 referenced in the complaint, nor are they relevant to it. Even
3 assuming for the sake of argument that Plaintiffs' assertions of
4 violations of these various laws and statutes were valid, they would
5 only be alleged defenses, which may not be considered part of the
6 pleadings for the purposes of determining whether a federal question
7 exists. Rivet v. Regions Bank, 522 U.S. 470, 475, 118 S. Ct. 921,
8 139 L. Ed. 2d 912 (1998). Further, there is no right to raise the
9 same as affirmative claims for relief in the action, as to do so
10 would destroy the summary nature of the unlawful detainer process.
11 See, e.g., Vella v. Hudgins (1977) 20 Cal.3d 251, 255 (although a
12 defendant may raise defenses to the conduct of the foreclosure sale,
13 affirmative claims of fraud and other wrongdoing are not
14 appropriate). This court is entitled to consider the purpose and
15 scope of the statutes governing the cause of action under the state
16 law in determining whether a pleading in fact satisfies the standard
17 for removal to federal court. See, Rubel-Jones Agency, Inc. V. Jones
18 165 F. Supp. 652 (WD Mo. 1958).

19 It should further be noted by this Court that Plaintiffs have
20 already had their day in court regarding their claims of statutory
21 violations and wrongdoing in connection with the foreclosure of the
22 Property. As stated in their complaint herein, Plaintiffs concede
23 that there was an Adversary Proceeding pending in the bankruptcy of
24 Plaintiff ANDREW CAMERON BAILEY (United States Bankruptcy Court for
25 the District of Arizona, Case No. 2:09-bk-06979-RTBP, Adversary Case
26 No. 2:09-ap-01727-RTBP).² What Plaintiffs fail to disclose to the
27

28 ²Plaintiffs allege, at paragraph 17 of their complaint herein: "Plaintiff's companion Adversary Case No. 2:09-ap-01727-RTBP filed on December 23, 2009 against these same defendants was dismissed without discovery or evidentiary hearing."

1 Court is that an order issued on July 23, 2010, dismissing the
 2 complaint in the Adversary Case *with prejudice* as a result of
 3 Plaintiffs' inability to state any cause of action against Defendant
 4 U.S. BANK regarding the foreclosure. A copy of the Bankruptcy
 5 Court's order is attached hereto as Exhibit A.

6 **III.**

7 **A SUA SPONTE ORDER IS APPROPRIATE IN THIS CASE**

8 28 USC §1447(c) states: "If at any time before final judgment
 9 it appears that the district court lacks subject matter
 10 jurisdiction, the court must remand an action ***sua sponte***." As the
 11 court acknowledged in Residential Funding Real Estate Holding, LLC
 12 v. Chavez, 2010 WL 3220065 (C.D. Cal. 2010), "a district court has
 13 an independent obligation to examine whether removal jurisdiction
 14 exists before deciding any issue on the merits" (citation omitted).
 15 This obligation to determine subject matter jurisdiction applies
 16 whether or not a party has filed a motion. See, Page v. City of
 17 Southfield, 45 F.3d 128, 133 (6th Cir. 1995). Further, one Court has
 18 already determined that no bona fide claim exists against U.S. BANK.
 19 The filing of this case is in complete disregard of that order and
 20 should not be countenanced.

21 Dated: 4/29/11

Respectfully submitted,

22 TFLG, A Law Corporation

23
 24 By: /s/ Eric G. Fernandez
 25 ERIC G. FERNANDEZ
 26 Attorney for Movant
 27 U.S. BANK NATIONAL ASSOCIATION,
 28 as Trustee